

FCC MAIL SECTION

Mar 22 1995
 Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FCC 95M-77

51040

In Matter of) WT DOCKET NO. 94-147
)
 JAMES A. KAY, JR.)
)
 Licensee of one hundred sixty)
 four Part 90 licenses in the)
 Los Angeles, California area.)

MEMORANDUM OPINION AND ORDER

Issued: March 20, 1995 ; Released: March 22, 1995

Background

1. Motion For A Protective Order was filed by James A. Kay, Jr. on March 03, 1995. The Wireless Telecommunications Bureau ("Bureau") filed its Opposition on March 14, 1995.

2. Kay seeks protection for information in documents sought in an outstanding document request and interrogatory discovery regarding Kay's billing and business records which relate to "end-users."¹ Kay asserts that such discovery would disclose his "customers" and that substantial damage would be caused to Kay's business if the information fell into the hands of competitors. Kay argues that he has no assurance that the Bureau would protect the documents from public disclosure in response to a request under the Freedom Of Information Act ("FOIA") [5 U.S.C. §552 et seq.]. Kay also asserts that substantially the same information is being sought in discovery in an unidentified pending state legal action that was brought by a competitor and that Kay is concerned that the Bureau will make this information available in that litigation. Kay alleges that he does not rely on the Bureau to protect the confidentiality of commercially sensitive data. Kay also indicates an intention to offer evidence at the hearing that will bear on his concern for Commission confidentiality.²

3. Kay proposes a form of protective order which will afford protection to customer information and which would limit the Bureau to:
 (1) only one copy of the documents, (2) disclosure to only Commission

¹ Kay identifies the objectionable discovery as the Bureau's First Interrogatory No. 4 and the Bureau's First Document Requests Nos. 4 and 5.

² A Prehearing Conference has been scheduled for March 30, 1995, at which time Kay will be permitted to briefly assert his concerns. However, the Presiding Judge considers a request for a protective order at the discovery phase to be a prehearing matter that will not require any evidence at the hearing. See Federal Rules of Evidence Rule 403 (trial judge may exclude evidence which is a waste of time.)

employees, and (3) public disclosure only as documents are admitted in evidence at the hearing. It would also require the Bureau to return the unintroduced documents to Kay after the hearing and to destroy other copies of such documents that have not been received in evidence or returned to Kay.

Discussion

4. The Commission's rule on discovery protective orders provides in pertinent part that a Presiding Judge:

may issue any order consistent with the provisions of [§§1.311-1.325] which is appropriate and just for the purpose of protecting parties ---. The order may specify any measures --- to protect any party or deponent from annoyance, expense, embarrassment or oppression.

47 C.F.R. §1.313. Similar protections are afforded under Rule 26(c) of the Federal Rules of Civil Procedure. But those who seek to avoid disclosures of commercial information bear a heavy burden of demonstrating that disclosure will work a clearly defined and a very serious injury. Citicorp v. Interbank Card Ass'n (DCNY 1979) 478 F. Supp. 756. Here Kay is being required to provide information about customers to the Bureau, a non-competitor. Kay's generalized allegations of concern do not provide an adequate showing of cause for a protective order at this time.

5. Also, under Kay's proposed protective order the Bureau would be materially obstructed in its preparation for hearing. It is noted that the investigation leading to the institution of this proceeding was conducted from the Bureau's Offices in Gettysburg, Pennsylvania. Also, members of the Bureau's trial team who are preparing this case are located in Gettysburg. At the same time, a lead attorney on the Bureau's team is stationed in Washington, D.C. who must be in a position to review evidence in Washington, D.C.³ There also may be investigators, engineers, paralegal assistants and other support personnel in both Washington, D.C. and in Gettysburg who have a need to see, review and analyze Kay's business documents. Thus, it is evident that the Bureau cannot be limited to working with only one copy of relevant documents.

6. Most importantly, the Bureau notes in its Opposition that the limitations that are sought by Kay would materially impede the Bureau from checking information with prospective witnesses who would appear to include persons who may be informers or competitors. However, the Bureau acknowledges the tension between trial preparation and the need to protect commercially sensitive data. The Bureau even recognizes that there may be justification here for a limited protective order that is narrowly tailored.

³ Also, as a matter of logistics there should be a full set of discovery documents in Washington, D.C. in order to accommodate any future need for a Prehearing Conference on short notice regarding an evidentiary or discovery issue.

7. The Presiding Judge has concluded that the Bureau needs the business records of Kay that will disclose the identity of and business data about end-users or customers. Those documents are relevant to the Bureau's allegations about an unlawfully inflated number of customers and/or units which relate directly to the issue of whether Kay obtained or sought to obtain frequencies to which he was not entitled. Kay has not objected to the discovery on any ground of burdensomeness. And there is no showing as to how much of the information regarding Kay's business that will need to be shown to a competitor.

8. The Presiding Judge is satisfied that the Bureau will exercise care in disclosing the information to third parties. However, counsel should discuss terms of a limited and narrowly tailored protective order which will not unduly burden or impede the Bureau's preparation for trial.

Rulings

Accordingly, IT IS ORDERED that the Motion For A Protective Order filed by James A. Kay, Jr. on March 03, 1995, IS DENIED.

IT IS FURTHER ORDERED that Kay SHALL PRODUCE by March 24, 1995, all documents which the Bureau has requested in its First Request for Documents.⁴

IT IS FURTHER ORDERED that by 3:00 p.m. March 29, 1995, the parties SHALL SUBMIT to the Presiding Judge any terms that the parties are able to agree upon for inclusion in a protective order and selected sample copies of the documents for inspection.

IT IS FURTHER ORDERED that the Bureau will make only in-house use of the customer identity/end user documents until further argument is heard at the Prehearing Conference of March 30, 1995.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁴ There has not been a request for additional time submitted by Kay to the Presiding Judge and it appears from a letter to Kay's counsel from Bureau counsel dated March 09, 1995, that the parties have agreed to the date of March 24, 1995, for the production of Kay's documents. The agreed date of March 10, 1995, for the filing by Kay of Answers and Objections to the Bureau's First Set Of Interrogatories has expired and Kay has filed his responsive pleading to the Bureau's interrogatories.